(4)

No. 05-1462

FILED
JUN 16 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

CITY OF SANTA CLARITA,

Petitioner,

v.

COUNTY OF LOS ANGELES, CEMEX, INC., AND UNITED STATES BUREAU OF LAND MANAGEMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

KERRY SHAPIRO
Counsel of Record
PATRICIA S. BRODY
SCOTT N. CASTRO
JEFFER, MANGELS, BUTLER & MARMARO LLP
Two Embarcadero Center, 5th Floor
San Francisco, CA 94111-3824
(415) 398-8080

Counsel for Respondent CEMEX, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT TO QUESTION PRESENTED

The Ninth Circuit allowed Petitioner City of Santa Clarita limited intervention in the underlying District Court action to protect its rights of consultation under the California Environmental Quality Act in light of a Consent Decree proposed by the existing parties, Respondents herein. The City of Santa Clarita objected to the Consent Decree, but the District Court, reviewing an extensive factual record, concluded that the City of Santa Clarita's right of consultation had been fully exercised and was not impacted by the terms of the Consent Decree. In an unpublished memorandum, the Ninth Circuit affirmed, concluding that the Consent Decree was fair, adequate and reasonable to all concerned. Neither the District Court nor the Ninth Circuit made any conclusions as to the collateral effects of the Consent Decree.

1. Whether the City of Santa Clarita properly petitions the Supreme Court to address purported concern regarding the Circuit Courts' application of *Firefighters v. Cleveland*, when the City of Santa Clarita failed to raise this claim at the District Court or Ninth Circuit;

2. Whether the City of Santa Clarita properly petitions the Supreme Court to address premature, and thus unripe, claims of purported collateral effects of the Consent Decree, given that neither the District Court's decision, nor the Ninth Circuit's unpublished decision, made any conclusions on this issue;

COUNTERSTATEMENT TO QUESTION PRESENTED – Continued

3. Whether the City of Santa Clarita properly petitions the Supreme Court to address a purported misunderstanding or misapplication of *Firefighters v. Cleveland*, where no confusion as to *Firefighters* exists;

4. Whether the Court of Appeals correctly concluded that the Consent Decree – which was negotiated in a contentious settlement process – was fair, adequate and reasonable where the District Court made factual determinations, based on extensive records, that Petitioner City of Santa Clarita's right of consultation under the California Environmental Quality Act had been fully exercised, and that the County had gained significant environmental concessions.

PARTIES TO THE PROCEEDINGS

No statement regarding the parties to this proceeding was provided by the City of Santa Clarita.

The petitioner in this case is the City of Santa Clarita (hereinafter "Santa Clarita"). The respondents are the United States of America, the County of Los Angeles, and CEMEX, Inc. The caption of Santa Clarita's petition identifies the Bureau of Land Management as a respondent. This is in error; the United States is the proper respondent in this matter.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, counsel for Respondent CEMEX, Inc. certifies the following:

Respondent CEMEX, Inc. is a publicly traded company having its principal place of business in Houston, Texas. Respondent CEMEX, Inc.'s parent corporation is CEMEX, S.A. de C.V., with its principal place of business in Monterrey, Mexico. No publicly-held company owns ten percent or more of the stock of CEMEX, Inc.

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STATEMENT OF CASE

Following well over a decade of environmental review under federal, state and local laws, CEMEX, Inc. ("CEMEX") filed the underlying lawsuit in early 2002 to compel the County of Los Angeles ("County") to complete its environmental review of the Soledad Canyon Sand and Gravel Mining Project ("Project"). The United States subsequently intervened as a plaintiff to support its interests in the Project as owner of the mineral estate to be mined by CEMEX pursuant to federal contracts issued in 1990, and to represent the Bureau of Land Management ("BLM") as the federal agency charged with implementation of the Mineral Materials Act of 1947, 30 U.S.C. § 601 *et seq.* The parties entered into the Consent Decree in 2004 to settle disputes relating to the interplay of federal and County jurisdiction over the Project. Santa Clarita, having been allowed limited intervention by the Ninth Circuit based on its right of consultation under the California Environmental Quality Act ("CEQA"), California Public Resources Code § 21000 *et seq.*, protested the entry of the Consent Decree. Based on an extensive factual record, the District Court found the Consent Decree to be fair, reasonable and adequate, and specifically found that Santa Clarita had fully exercised its right of consultation during the review processes for the Project, and that the Consent Decree in no way impacted its rights of consultation. The Ninth Circuit upheld the District Court's decision.

A. The Soledad Canyon Sand and Gravel Mining Project

The underlying action involves the United States' and CEMEX's efforts to implement the Project. The facts recited herein were independently reviewed by the District Court and affirmed in its decision, and are set forth in

detail in the Consent Decree. Petitioner's Appendix (hereinafter "App.") C-38-50. The Project site is in the Soledad Canyon area of unincorporated Los Angeles County, approximately 30 miles north of downtown Los Angeles and over 1½ miles from the municipal boundary of Santa Clarita. Ninth Circuit Supplemental Excerpts of Record, "SER," 97-98. The United States owns the minerals at the site and the property is administered through the BLM. The BLM, by virtue of a federal Court approved settlement in 1988:[1] (a) made the decision to sell the mineral materials in 1989 through competitive bidding; (b) awarded federal contracts to CEMEX's predecessor in 1990 allowing it to mine aggregate on the site; (c) completed an independent environmental review of the project under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4231 *et seq.*, from 1995 to 2000; (d) completed a 2,000 page Environmental Impact Statement ("EIS") under NEPA; and (e) issued a final Record of Decision ("ROD") in 2000.

Santa Clarita participated extensively in the BLM process, including the submission of voluminous written comments and in person meetings with the BLM. SER 709-10, 733-36, 2058-62. In addition, Santa Clarita appealed the ROD to the Interior Board of Land Appeals ("IBLA"). Following Santa Clarita's filing of multiple briefs, the IBLA issued an order precluding Santa Clarita from submitting additional briefs. SER 27-28. The IBLA

[1] Prior to the settlement, the site was being mined by Ben Curtis, the surface owner at the time, and his unsuccessful litigation regarding his continued mining operations resulted in two appeals to the Ninth Circuit. *United States of America v. Canyon County Enterprises*, 9th Cir. No. 90-55302 and *United States of America v. Canyon County*, 9th Cir. No. 98-56042.

then issued an order affirming the ROD and the BLM's environmental analysis, rejecting in full Santa Clarita's claims. *Sierra Club, Santa Clarita Chapter, et al.*, 156 IBLA 144 (January 8, 2002).

The County's involvement in the Project began in 1989 as well. The County's activity under California's Surface Mining and Reclamation Act ("SMARA"), California Public Resources Code § 2710, *et seq.*, and CEQA, began formally in May of 1991 when CEMEX's predecessor submitted an application for a surface mining permit. Under CEQA, the County was the lead agency. The County began CEQA proceedings by issuing a Notice of Preparation ("NOP") for an environmental impact report ("EIR") on November 6, 1991. It was not until 1999, eight (8) years after CEMEX had submitted its application to the County, that a completed draft EIR was publicly circulated for nine months of public review and comment. The County's professional planning staff issued a staff analysis for the Project that recommended approval. SER 1041-59, 2460. As found by the District Court, the County held over nineteen continued public hearing sessions on the Project, both before the Regional Planning Commission, and before the Board, including at least ten public hearing sessions with public comment and/or testimony, giving the County ample opportunity to hear the public's concerns with, comments on, and opposition/support for, the Project. App. C-122; *see also* SER 1062-93, 1098-1229, 1231-33, 1235-60, 1309-10, 1312-44, 1351-92, 1454-1539, 1546-86, 1602-70, 1725-30, 1765-84. The District Court also found that Santa Clarita participated in at least nine (9) of these public hearings. App. C-122; *see also* SER 1061, 1098-1101, 1225-29, 1316-25, 1354-91, 1456-1527, 1558-78, 1602-08, 2080-85.

Following these public hearing sessions, the Los Angeles County Regional Planning Commission voted to deny the Project on grounds CEMEX believes were pretextual.

B. District Court Proceedings

The County's denial of the Project was appealed to the County Board of Supervisors and ultimately necessitated the filing of the lawsuit by CEMEX against the County which outlined in detail the environmental review of the Project for over a decade. On January 25, 2002, CEMEX filed the underlying lawsuit in the U.S. District Court, Central District of California, challenging the County's repeated and continued delay and obstruction of the Project. CEMEX alleged that the County's environmental review was complete under CEQA, and that denial of the permit was pretextual and without basis. Thus, CEMEX's Complaint alleged that the County engaged in a process designed to result in a "*de facto*" denial of the Project through a seemingly endless politically-driven review process before the County, including nearly a decade of environmental review, multiple series of delays, changing and inconsistent environmental review standards, and excessive, unreasonable and infeasible proposed Project conditions. Preemption of the County process was sought as an alternative basis for relief. The United States intervened as a plaintiff in the action. Santa Clarita sought intervention, but was initially denied intervention by the District Court. Santa Clarita appealed this denial to the Ninth Circuit.

After the filing of the lawsuit, the parties were ordered (pursuant to local rules) to participate in a mediation

conducted by a retired federal judge that, after almost a year of hard fought negotiations, resulted in the Consent Decree approved by the District Court and affirmed by the Ninth Circuit Court of Appeals. The mediation process was ordered in December of 2002 and Santa Clarita was aware of settlement negotiations. SER 162, 224.

The claim that the Consent Decree disregards years of environmental review, Petition at 12, is not true. The Consent Decree navigates the interplay between federal and County jurisdiction over the Project, allowing for County environmental review under CEQA, while maintaining the integrity of the federal mineral materials program and the specific BLM decisions relating to the Project. The Consent Decree also allows the County to complete its environmental review process, and to impose on the Project a host of environmentally and socially beneficial conditions otherwise not required. App. C-63-78. The Consent Decree does not truncate environmental review, but rather directs that after a decade of environmental review at both the federal and state level, the County must issue a surface mining permit, thereby allowing the next phase of the Project to begin. The District Court considered, and rejected, the argument that any significant new information existed that warranted further analysis. App. C-110-118.

After the parties submitted the Consent Decree to the District Court, the Ninth Circuit reversed the District Court and granted Santa Clarita limited intervention relating to its rights of consultation under CEQA. App. B-3-8. The Ninth Circuit specifically directed that Santa Clarita took the case as it found it, and could only address prospective matters in the case: "the City shall be entitled to be heard concerning the court's approval of any consent decree proposed between the original parties, and to

appeal the approval of any such decree, but shall not be entitled to reopen any issues already decided in the case." App. B-9.

Santa Clarita then filed an extensive opposition to the Consent Decree. The District Court reviewed the voluminous factual record supporting the Consent Decree, comprised of an Administrative Record of over 30,000 pages. Ninth Circuit Excerpts of Record, "ER," 928. In addition, in reviewing the proposed Consent Decree, the District Court reviewed additional documents either judicially noticed or supported by declaration. In this review, the District Court considered in detail the extent to which Santa Clarita participated in the process. In its Order Approving the Entry of the Consent Decree, the District Court concluded as follows:

> This Court is not persuaded with the City's argument that it was excluded from the process. The record is clear that the City has actively participated throughout the framing, analysis and development of this Project. In fact, the County encouraged the City's participation as a commenting party on the Project. However, unsatisfied with its role as a commenting party, it appears now that the City has adopted a no-holds barred approach to do whatever is in the City's power to either stop the Project or continue with this never ending review process. This Court will not allow the City to usurp the County's CEQA process simply to stop or further delay the Project. App. C-109-110.[2]

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[2] The voluminous factual record considered by the District Court revealed that Santa Clarita: (1) spent over $4,000,000 to oppose the Project, SER 2387; (2) constantly shifted its environmental concerns; (3)

(Continued on following page)

The District Court's Order entering the Consent Decree was detailed, App. C-85-123, and specifically found that, based on an extensive Administrative Record before the Court and the long history of environmental analysis conducted for the Project, the Consent Decree sets forth a Project that "fully identifies significant environmental effects and feasible mitigations, and which, in fact, provides additional environmental and other benefits to the County as a whole and the City in particular." App. C-107.

C. The Court of Appeals' Decision

In reviewing the Consent Decree, the Court of Appeals focused on whether it was "fair, reasonable and adequate to all concerned." App. A-2, *citing Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied sub nom. Byrd v. Civil Service Comm'n*, 459 U.S. 1217 (1983). In an unpublished opinion, the Court determined that: (1) CEMEX's underlying lawsuit was "based on a plausible legal claim – that further county environmental review of the project was preempted"; (2) the County "had sole authority to settle the case"; (3) the Project had "undergone more than a decade of state environmental review"; (4) the "parties negotiated the consent decree in good faith and at arm's length"; and (5) the County "obtained significant environmental concessions." App. A-2. The Court emphasized that the "whole point of a consent decree is that the court need not adjudicate the merits[,]" and specifically concluded only that the district court acted "well within its discretion" in approving the Consent Decree. App. A-2.

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did not seek environmental compliance but rather to block all CEMEX permits and to destroy its business, SER 83-84; and (4) repeatedly stated its "willingness to spend whatever it takes" to stop the Project, SER 2347.

D. Current Litigation Being Pursued By Santa Clarita

At this time Santa Clarita is currently still litigating three lawsuits in the federal courts (two of which are pending before the Ninth Circuit Court of Appeals) that advance environmental challenges to the Project.[3] Given this, Santa Clarita's statement in the Petition (p. 12) that the Consent Decree effectively forecloses "Santa Clarita's efforts to insure a complete and thorough environmental review" is inaccurate at best.[4]

Santa Clarita's pending federal court cases include:

(a) *City of Santa Clarita, et al. v. U.S. Dept. of Interior, et al.*, Ninth Circuit Court of Appeals, No. 06-55006 (U.S. District Court, Northern District of California, No. CV-02-00697 DT) an action challenging the Project under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, – summary judgment granted against Santa Clarita by Order dated November 21, 2005 with 34 pages

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[3] A non-Santa Clarita challenge to the Project was brought as well. The Ninth Circuit Court of Appeals recently issued a published opinion upholding a decision by Judge Takasugi of the U.S. District Court, Central District of California, favorable to the Project, finding no error by the U.S. Fish and Wildlife Service in the issuance of a biological opinion for the Project in 1998 pursuant to the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. *See Center for Biological Diversity, et al. v. U.S. Fish and Wildlife Service, et al.*, ___ F.3d ___, 2006 WL 1521120 (9th Cir. 2006).

[4] Santa Clarita's statement that it is precluded from seeking "additional mitigation measures[,]" Petition at 12, fails to acknowledge that the Consent Decree actually includes many mitigation measures and conditions suggested by Santa Clarita that were not legally required for the Project, ER 905.

of Findings of Fact and Conclusions of Law dated January 30, 2006;

(b) *City of Santa Clarita v. U.S. Dept. of Interior Board of Land Appeals et al.*, Ninth Circuit Court of Appeals, No. 06-55225, consolidated with Case No. 06-55006 (U.S. District Court, Northern District of California, No. CV 04-1572 DT), an action challenging the Project under NEPA – summary judgment granted against Santa Clarita by Order dated January 3, 2006, with 37 pages of Findings of Fact and Conclusions of Law dated February 8, 2006; and

(c) *City of Santa Clarita v. Los Angeles County Board of Supervisors*, U.S. District Court, Northern District of California, No. CV-04-7356 DT, an action challenging the Project under CEQA which is still pending; contrary to Santa Clarita's characterization, the district court stayed the CEQA action while the Consent Decree was on appeal to the Ninth Circuit recognizing that "In making its determination [to stay] this Court is by no means finding that all issues in the Cemex and CEQA actions are identical . . . For those legal and factual issues not affected by the Appeal, the City will have its opportunity to address and litigate them." App. J-21.

SUMMARY OF ARGUMENT

Santa Clarita seeks further review of the Consent Decree, even though there are no legal issues warranting review. The District Court concluded the Consent Decree to be fair, reasonable and adequate, and specifically, that Santa Clarita's right of consultation had been fully exercised and was not impacted by entry of the Consent Decree. The Court of Appeals affirmed. Now, Santa Clarita alleges a host of rights purportedly abridged by the Consent Decree, and seeks review by the Supreme Court of issues that were never raised in the prior proceedings, are not presented by the facts of this case, or are premature and thus unripe.

Under this Court's standard for granting *certiorari*, Santa Clarita must show that the Ninth Circuit Court of Appeals: (1) issued a decision in conflict with that of another Court of Appeals; (2) decided an important question of federal law that has not been settled by this Court; or (3) decided an important federal question in conflict with relevant decisions of the Supreme Court. Supreme Court Rule 10. None of these bases apply.

The underlying decisions by the District Court and Court of Appeals were largely factual decisions that present no novel or significant legal issues worthy of review by this Court. The District Court and Court of Appeals applied well-settled standards for consent decrees – whether they are fair, reasonable and adequate – to an extensive administrative record of over 30,000 pages, to make a factual determination that Santa Clarita's right of CEQA consultation had been exercised and is not impaired by the Consent Decree. In fact, Santa Clarita concedes in

its Petition that "the City actively participated in the CEQA review process[.]" Petition p. 3.

Santa Clarita struggles to construct legal issues worthy of this Court's review. This effort fails in its entirety. For example, Santa Clarita alleges a "routine, now doctrinal confusion" regarding the application by the Circuit Courts of this Court's opinion in *Local Number 93, International Association of Firefighters, AFL-CIO C.L.C. v. Cleveland* ("*Firefighters*") 478 U.S. 501 (1986). Yet Santa Clarita never raised this argument below, and is precluded from raising it for the first time here. More importantly, even if properly raised, the claim fails; there is no conflict between the Circuits and no indication that *Firefighters* has resulted in injustice or has been misapplied.

Similarly, Santa Clarita protests the purported collateral effects of the Consent Decree, yet the Ninth Circuit expressly did not address such effects of the Consent Decree. In fact, as discussed above, Santa Clarita has other litigation currently pending – including two other Ninth Circuit appeals and a U.S. District Court CEQA action – that challenge the environmental review of the Project. The extent to which the Consent Decree has collateral impact on these other cases will be determined in the first instance in these other pending cases. Santa Clarita's protests regarding purported collateral effects of the Consent Decree are at best premature and unripe, and certainly not properly raised before this Court.

ARGUMENT

A. Santa Clarita Did Not Challenge the Application of *Firefighters* Below

Santa Clarita's main attempt to interest this Court in the Petition is a purported Circuit conflict in the application of *Firefighters*. However, at no point in the briefing before either the District Court or the Ninth Circuit Court of Appeals did Santa Clarita assert the arguments it makes here. There was no challenge to the application of *Firefighters* in any briefing before the Petition was filed, and it was not cited by either the District Court, App. C-85-123, or the Ninth Circuit Court of Appeals, App. A-1-3. In fact, at no time in any briefing or argument before the Ninth Circuit did Santa Clarita even cite to *Firefighters*.[5] Having failed to challenge the application of the *Firefighters* decision below, Santa Clarita is precluded from challenging it for the first time in this Petition. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Thus, the purported Circuit conflict (which in any event, as discussed below, does not exist) is not properly raised to this Court.

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[5] Santa Clarita's only cite to *Firefighters* before the District Court was a one-line statement that because a consent decree is both a settlement and a final judgment, its dual character "has resulted in different treatment for different purposes" *citing Firefighters*. Santa Clarita's Opposition to Motion to Enter Consent Decree, at 46, lines 13-15. Santa Clarita did not cite *Firefighters* in its Ninth Circuit briefs, and notably, it is not cited at all in the portion of Santa Clarita's brief submitted in support of the Petition where it argues the Consent Decree infringes on its right to consultation. App. I-7-8. Only one amicus party before the Ninth Circuit cited *Firefighters*, and in no way criticized the application or interpretation of it.

B. The Decision Below is Unpublished and Has No Precedential Effect

Further undermining Santa Clarita's Petition is the fact that the Ninth Circuit's Memorandum is unpublished. App. A-1. Pursuant to Ninth Circuit Rule 36-3(a), "[u]npublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, *res judicata*, and collateral estoppel." Thus, the decision establishes no precedent, and has no impact on the decisions of other panels of the Ninth Circuit or District Courts within that Circuit.[6]

C. Santa Clarita's Arguments, if Ever Appropriate for Review, Are Now Premature and its Remedies Lie Before Other Courts

As detailed herein, Santa Clarita is currently involved in no less than three lawsuits, two of which are currently pending before the Ninth Circuit Court of Appeals, regarding Santa Clarita's complaints about the environmental review of the Project. Whatever collateral effect there may be from the Consent Decree on these other challenges will be litigated in those actions.[7] Nothing in the Ninth

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[6] We note that the Supreme Court recently adopted an amendment to Federal Rule of Appellate Procedure 32.1 that will be effective on December 1, 2006, providing in relevant part that "[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written disposition that have been . . . designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like . . . *issued on or after January 1, 2007*." (Emphasis added). Thus, Circuit Court Rules prohibiting the citation of unpublished decisions, including the Ninth Circuit Rule 36-3, will remain in effect for all decisions issued prior to January 1, 2007.

[7] *See, e.g., Firefighters*, wherein the Supreme Court noted that the district court's retention of jurisdiction regarding the consent decree left

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Circuit's unpublished Memorandum purports to address the collateral effects of the Consent Decree. Accordingly, it is premature and unripe for Santa Clarita to seek to have this Court address the impact of the Consent Decree which will be addressed in the first instance in other pending cases.

D. Even if Properly Raised Before this Court, There is No Conflict Between the Circuits Nor any Indication that *Firefighters v. Cleveland* is Being Misapplied

Santa Clarita's reliance on a purported misapplication of *Firefighters* by subsequent courts is misplaced. Even if Santa Clarita properly raised this argument below, which it did not, cases following *Firefighters* have not resulted in any need for the opinion to be reexamined by this Court.[8] Rather, subsequent case law is notable for its general harmony in examining consent decrees and their effects on third parties.

Initially, the Supreme Court has not substantively revisited *Firefighters* since 1997, and then, only in the context of deciding whether an underlying case must be adjudicated before entry of a consent decree, and this Court concluded it did not. In 1997, in *Lawyer v. Department of Justice*, 521 U.S. 567 (1997) the majority opinion held that a settlement between the United States Department of

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that forum open for the petitioner to press whatever claims it might have as to the effect of the consent decree on the petitioner's legal rights. 478 U.S. 501, 514, n. 5; also 478 U.S. at 530.

[8] Santa Clarita's reliance on commentators no more recent than 1988, Petition at 24, reveals a lack of concern or topicality on the points upon which its Petition seeks review by this Court.

Justice and the State of Florida regarding voting district configuration could not be blocked by the objections of one of the plaintiffs who demanded that the legality of the original redistricting plan be determined before the settlement could be approved. The majority ruled that the district court was not required to adjudicate the underlying liability before approving the settlement.

In reviewing the Consent Decree here, the District Court below relied upon, *inter alia*, *United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991)[9] and *Sierra Club Inc. v. Electric Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990), App. C-95. The Ninth Circuit relied upon, *inter alia*, *United States v. Montrose Chem. Corp.*, 50 F.3d 741, 746 (9th Cir. 1995), App. A-2. Each of these cases was decided *after Firefighters* and evidences no confusion or misapplication of its holding or analysis.

Santa Clarita contends that the circuit courts are "confused" regarding the meaning of *Firefighters*, and more specifically, about the "process due an objecting third party in cases involving consent decrees." Petition at 18. Yet in truth, the circuit courts have not expressed any such confusion. The string citation of cases offered by Santa Clarita, Petition at 18-19, offers nothing other than examples of cases where consent decrees were either entered or rejected in light of challenges from non-consenting third parties. In fact, not one of the cases cited by Santa Clarita offers any evidence of confusion on the

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[9] Both courts also relied upon *Officers For Justice v. Civil Service Comm'n*, *supra*, 688 F.2d 615, a case which predates the *Firefighters* decision but is consistent with its analysis and holding.

part of the court in question regarding the application or effect of *Firefighters*. Indeed, Santa Clarita's failure to engage in any analysis of these cases (other than one-line parenthetical summaries) is not surprising, given that the cases do not demonstrate any confusion by the courts or conflicts between Circuits regarding *Firefighters*.

In fact, Santa Clarita's list of citations purportedly showing conflict between the Circuits relating to the application of *Firefighters* flatly misstates the law. First, because a number of the cases cited by Santa Clarita predate *Firefighters*, they clearly cannot show confusion as to its application. *See, e.g., Wheeler v. American Home Products Corporation*, 582 F.2d 891 (5th Cir. 1977); *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (en banc); *Kirkland v. New York State Dept. of Correctional Services*, 711 F.2d 1117 (2nd Cir. 1983).

Second, in other cases cited by Santa Clarita, the courts have applied *Firefighters* and its logic with consistency. Thus, in *United States v. City of Hialeah*, 140 F.3d 968 (11th Cir. 1998), the Eleventh Circuit found a consent decree between the United States and the City of Hialeah invalid to the extent it adversely affected the legal rights of unions and other objecting parties. The Eleventh Circuit expressly found that the consent decree would adversely affect legal rights conferred on police and firefighters via collective bargaining agreements. 140 F.3d at 981-82. In *Sanguine, Ltd. v. United States Department of Interior*, 798 F.2d 389, 391 (10th Cir. 1986), the Tenth Circuit upheld the district court's vacating of a prior consent decree because of the adverse effects that the consent decree would have upon tribal members' rights: "this case presents a unique situation in which prejudice to the intervenors can be avoided only by setting aside the prior

judgment and allowing the opportunity to litigate the merits of the case."

The cases cited by Santa Clarita in which there was no impairment of third party rights have also been resolved in harmony with *Firefighters*. For example, in *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991), the Seventh Circuit upheld the district court's denial of intervention to several parties who protested the terms of a consent decree settling claims challenging Illinois' abortion laws, concluding in part that their interests were adequately represented by the state, and that "[p]rejudice to the intervenors (or other members of the proposed class) if intervention is denied . . . is problematic at best." Similarly, in *Southern California Edison Co. v. Lynch*, 307 F.3d 794 (9th Cir. 2002), the Ninth Circuit upheld entry of a consent decree, recognizing that under *Firefighters*, a nonconsenting party cannot block a settlement between other parties by withholding consent, but also acknowledging that *Firefighters* provides an exception where "nonconsenting intervenors" have brought "valid claims" that are "properly raised." *Id.* at 807. From this, the Ninth Circuit concluded that the intervenor did not raise "valid claims" within the *Firefighters* exception because the exception only applies where an intervenor can maintain claims that are independent from those of the settling parties. *Id.* at 807. So too, in *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 279 (1st Cir. 2000), the First Circuit addressed claims that *Firefighters* required an evidentiary hearing, but found that requirement to be limited to employment discrimination cases, and that no such absolute right to an evidentiary hearing applied in other contexts.

Finally, *Johnson v. Lodge #93 of Fraternal Order of Police*, 393 F.3d 1096 (10th Cir. 2004) directly undermines Santa Clarita's mischaracterization of Circuit conflict in the interpretation or application of *Firefighters*. There, in addressing whether a consent decree adversely affected a union's interests, the Eleventh Circuit, *citing Firefighters*, stated that a non-consenting intervenor may block approval of a consent decree only if the decree adversely affects its legal rights or interests, *citing* directly the holdings in *United States v. City of Hialeah*, *supra*, 140 F.3d at 975 and *United States v. City of Miami*, *supra*, 664 F.2d at 447. *Id.* at 1107. The Eleventh Circuit's reference to and reliance on these decisions thus undermines the City's assertion of conflict among the circuits and, in fact, directly contradicts the City's assertion that *Johnson v. Lodge #93 of Fraternal Order of Police* is in conflict with *City of Miami* and *City of Hialeah*. *See* Petition at 18. Rather, in contrast to Santa Clarita's portrayal, unlike the courts in *City of Miami* and *City of Hialeah*, the Eleventh Circuit in *Johnson* found that the consent decree did not affect the union's legal rights. *Id.* at 1107.

Johnson v. Lodge #93 of Fraternal Order of Police also undermines the City's claims because the Court also considered the union's assertion that a trial on the merits was necessary in race discrimination cases. 393 F.3d at 1108. The union relied in part on *Sanguine*, *supra*, 798 F.2d 389 (also a Tenth Circuit decision), but the *Johnson* Court clarified that:

> In *Sanguine*, we held that because "issues essential to the intervenors were resolved by consent decree and not adversary litigation, [the] case presents a unique situation in which prejudice to the intervenors can be avoided only by setting aside the prior judgment and allowing the opportunity to

> litigate the merits of the case." . . . The case is distinguishable. The intervenor in *Sanguine* was not granted intervenor status prior to entry of the decree and thus was unable to effectively present its objections to the decree. In contrast, here, the district court permitted [the union] to intervene prior to settlement negotiations, *to file written objections to the consent decree in the district court, and to participate in the fairness hearings as a full party to the litigation. Accordingly, as was the case with the intervening union in [Firefighters] Local No. 93, [the union] was afforded "all the process that [it] was due."*

Id. at 1108-09 (citations omitted) (emphasis added). The participation in the consent decree review process afforded the union in *Johnson v. Lodge #93 of Fraternal Order of Police* mirrors that afforded to Santa Clarita.

That courts have entered or rejected consent decrees based on third party challenges does not reflect confusion; to the contrary, it demonstrates that the courts understand when entry of a consent decree is or is not appropriate in light of a third party challenge. The discussion below demonstrates that Santa Clarita received all that it was entitled to in the Consent Decree review process.

E. The Issues Presented to the District Court and Affirmed by the Ninth Circuit are Inextricably Fact Based and Were Correctly Determined

1. Santa Clarita's Right is one of "Consultation" and it Has Been Satisfied

Every administrative body or court which has considered the arguments of Santa Clarita has concluded that its

right to consultation under CEQA has been fully exercised. The "right" about which Santa Clarita complains was specifically described in the 2004 Ninth Circuit opinion allowing Santa Clarita to proceed as an intervenor as the right of consultation under CEQA. App. B-5. CEQA confers upon Santa Clarita a right to consultation with the County, the local lead agency:

> [E]very local lead agency shall consult with, and obtain comments from, each responsible agency, any public agency that has jurisdiction by law with respect to the project, and any city or county that borders on a city or county within which the project is located. . . .

California Public Resources Code § 21153(a). Santa Clarita has repeatedly and consistently characterized the right which it argues the Consent Decree infringes on as the right to CEQA consultation. *See, e.g.*, Santa Clarita Opposition to Motion to Approve Consent Decree pp. 49-50; App. I-7-8.

Based on an extensive factual record, the District Court noted that "the City and the public had ample opportunity to review and comment on the Project[,]" based on Santa Clarita's submittal of at least nine (9) comment letters on various drafts of the County's Environmental Impact Report, and participation in at least nine (9) County public hearings on the Project. App. C-121-122. The District Court further noted that, even after the formal close of public commenting on the Project, the "County requested that CEMEX meet with the City and other public groups to attempt to address all community concerns over the Project." App. C-122. The Ninth Circuit, in ordering Santa Clarita's intervention in 2004, also concluded that Santa Clarita "exercised its CEQA right of

consultation and strongly opposed CEMEX's plans to proceed with gravel mining in Soledad Canyon." App. B-2. As an intervenor, Santa Clarita fully vetted its arguments concerning potential effects of the Consent Decree on its consultation rights under CEQA.

The District Court also concluded that Santa Clarita was aware of settlement negotiations between the parties as early as November of 2002 despite representations to the contrary. SER 162, 224. Yet at that time, Santa Clarita did not seek to expedite its appeal of the intervention ruling that was pending before the Ninth Circuit. In other words, Santa Clarita's statement in its pending Petition that it was excluded from the negotiating process leading up to the Consent Decree fails to recognize the timing was of Santa Clarita's own making.

So, too, in the unpublished Memorandum of the Ninth Circuit affirming the entry of the Consent Decree, the Court concluded that the County, acting as the lead agency under California law, had the sole authority to settle the case and that when the settlement occurred, the Project had undergone more than a decade of state environmental review. App. A-2. It was argued to the Ninth Circuit in papers submitted and in oral argument that the Consent Decree expressly recognizes that other permits will be required before the Project can become operational and that the Consent Decree does not preclude continuing oversight of the Project by applicable regulatory agencies. Under the Consent Decree, the County also retains full authority to enforce all Project conditions and environmental mitigation measures (now and in the future) and to take lawful action in response thereto. App. C-11-12. The Ninth Circuit was aware of the other pending environmental challenges by Santa Clarita to the Project and

specifically stated in its unpublished Memorandum that "the panel retains jurisdiction over all future appeals involving this mining project." App. A-3.

During oral argument before the Ninth Circuit, the panel stated that the complaints of Santa Clarita as to its role in the environmental review process should be directed to the California State Legislature for, in fact, Santa Clarita's true complaint was that it wanted a greater role in the CEQA process than the statute provides. Santa Clarita, throughout the environmental review process, both at the federal and County level, established that it wanted to control decisions properly within the County's province relating to the Project.

The point simply is that the "right" which Santa Clarita seeks to assert and complains it is precluded from enjoying is a right of consultation which the substantial factual record before the District Court (and the Ninth Circuit) established was amply exercised and not precluded by the Consent Decree about which Santa Clarita complains.[10]

2. Santa Clarita's "Right to Judicial Review" is Satisfied by its Pending District Court CEQA Lawsuit

Santa Clarita has a pending lawsuit challenging on CEQA grounds the County's actions implementing the

[10] The Consent Decree is not a bilateral agreement of a trilateral dispute simply because it settles only disputes between CEMEX and the United States against the County. Any separate, i.e., third, dispute that Santa Clarita might have against the County or CEMEX and the United States, may be raised elsewhere. Moreover, the Consent Decree concludes the CEQA process, and in doing so, was found not to impact Santa Clarita's right of consultation under CEQA.

terms of the Consent Decree. As discussed above, the impact of the Consent Decree on those claims has not been adjudicated by either the District Court or the Ninth Circuit, and will be determined in the first instance by the District Court when the CEQA lawsuit is litigated. Santa Clarita's claims in its Petition that the District Court's entry of the Consent Decree "denied Santa Clarita its day in court[,]" Petition at 10, is thus untrue because its day in court relating to its CEQA lawsuit and other matters has yet to come.[11]

3. Santa Clarita's "Rights" as a Surface Owner and as a Municipality Are Preserved

Santa Clarita also contends that it has "proprietary interests" as owner of the Project's surface estate, which Santa Clarita will readily admit it recently bought, App. G-5, for the sole purpose of enhancing its standing to object to the Project, as owner of municipal property purportedly affected by the Project, and as an employer.

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[11] Moreover, any suggestion that the Consent Decree precludes Santa Clarita generally from opposing the Project and voicing its concerns rings hollow. In addition to its litigation efforts, Santa Clarita has a pending application to the Los Angeles Local Agency Formation Commission to annex the Project site into Santa Clarita's municipal boundaries (again, the site is currently within County territory), an effort admitted by Santa Clarita to be designed to aid in blocking the Project. Santa Clarita is also currently lobbying for passage of federal legislation designed to specifically preclude only this Project by canceling the mineral contracts that the BLM issued to CEMEX's predecessor, Transit Mixed Concrete, in 1990. In fact, Santa Clarita is on record regarding its intent to "[a]ttack all subsequent agency permits[ ]" for the Project, SER 83, and to "[d]evelop [a] package of measures to interfere with TMC's business plan," SER 84. Santa Clarita thus is not lacking in stratagems, or in venues, in which to challenge the Project.

Petition at 11. Santa Clarita fails to state how these purported state law rights – which were not identified by the Ninth Circuit as a basis for granting limited intervention, App. B-1-10 – are affected by the Consent Decree. Again, however, what impact, if any, the Consent Decree has on these other purported state law "rights" has not yet been adjudicated.

4. The District Court and Ninth Circuit Fully Addressed All Appropriate Legal Claims Raised by Santa Clarita

In 2004, the Ninth Circuit explicitly directed that Santa Clarita was to take the case as it found it:

> We note that the District Court may move forward with a consent decree between CEMEX and the County. . . . the City shall be allowed to intervene as of the date of this disposition, and to be treated as an intervenor party from that date forward. . . . Thus, the City shall be entitled to be heard concerning the court's approval of any consent decree proposed between the original parties, and to appeal the approval of any such decree, but shall not be entitled to reopen any issues already decided in this case.

App. B-8-9. Accordingly, it was clear from the moment that intervention was granted in 2004 that Santa Clarita was limited to arguing legal claims or defenses directly challenging the Consent Decree itself, but not relating to the underlying merits of CEMEX's complaint. Any Santa Clarita complaint as to the propriety of this limited grant of intervention is undermined by the fact that Santa Clarita never further appealed the scope of intervention ordered by the Ninth Circuit over two (2) years ago, App.

B, either by seeking *en banc* review or petitioning this Court for review.

Though Santa Clarita protests the adequacy of a "fairness hearing"[12] to address its concerns relating to the Consent Decree, what it really laments is that its legal theories relating to the Project were not adjudicated in its favor. However, this lament is in direct contradiction to the very purpose of the consent decree process, namely to reach compromise between parties without the need for full adjudication of the underlying legal issues. A district court should enter a consent judgment if the court decides that it is fair, reasonable, and equitable and does not violate the law or public policy. *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, *supra*, 909 F.2d 1350, 1355; *see also United States v. Oregon*, *supra*, 913 F.2d 576. The consent decree must also conform to applicable laws. *See United States v. Oregon*, 913 F.2d at 580. Additionally, where a consent decree may affect the public interest, there is a heightened responsibility on the court to protect that interest, but "the court need not require that the decree be 'in the public's *best* interest' if it is otherwise reasonable." *Id.* at 581 (citations omitted). Ultimately, in approving a consent decree, the "court need only be satisfied that the decree represents a reasonable factual and

[12] This language is used by Courts approving Consent Decree in all cases – not merely class actions. *See, e.g., Sierra Club v. Electronic Controls Design, Inc.*, *supra*, 909 F.2d 1350, 1355 (Consent decree challenge involving Clean Water Act citizen suit by Sierra Club against private party), *citing Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125-26 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984) (Involving dispute as to consent decree in multi-party litigation under the Clean Water Act).

legal determination." *Id. citing United States v. City of Miami, supra*, 664 F.2d 435, 441.

Santa Clarita claims that the "fairness hearing" looked only to whether the Consent Decree was "fair, reasonable and equitable" as to the consenting parties, and relied upon the "arm's length" negotiations among those parties as the basis for entry of the Consent Decree. Petition at 13. Santa Clarita concludes that this process "illustrates the routine, now-doctrinal confusion of courts substituting the test of fairness to settling parties for an inquiry into the rights of non-settling parties." *Ibid.*

This claim is remarkable for its misstatement of the actual factual review conducted by the District Court. Santa Clarita filed lengthy objections to the Consent Decree, App. C-100-123; I-1-8, and the Court considered them at a lengthy hearing. The bulk of the District Court's Order granting the motion for entry of the Consent Decree, App. C-85-123, addresses Santa Clarita's numerous arguments in opposition to the Consent Decree. Santa Clarita contends that "[w]hen the court reviews a proposed consent decree to which a party has not consented, it should be asking whether the consenting parties are taking away from the nonconsenting party to whom they are adverse that which may not be summarily taken." Petition at 14. Yet this is precisely the inquiry that *was* conducted. As discussed above, the District Court noted that "[t]he record is clear that the City has actively participated throughout the framing, analysis, and development of this Project." App. C-109. The District Court further assessed in detail whether the Consent Decree would impair public interests, including *inter alia*, Santa Clarita's first amendment right to petition government and the public right of review under CEQA. App. C-120-121.

Santa Clarita's claim that the District Court "extinguished" Santa Clarita's rights based on a finding that the parties to the Consent Decree "'negotiated the consent decree in good faith and at arm's length[,]'" Petition at 15, is far from the truth. The District Court went far beyond an assessment of whether the Consent Decree was fair and reasonable to the consenting parties, and actually adjudicated the host of claims raised by Santa Clarita in opposition to its entry. Thus, the District Court did reach a "ruling on the merits" of Santa Clarita's arguments in opposition to the Consent Decree. *See* Petition at 16-17. In fact, Santa Clarita's discussion of *Lawyer v. Department of Justice*, *supra*, 521 U.S. 567, Petition at 16 n. 6, actually provides support for this conclusion. As admitted by Santa Clarita, the "fairness hearing" in *Lawyer* allowed the non-consenting plaintiff to raise challenges to the consent decree and to present evidence in support of those claims. 521 U.S. at 574-75. The District Court afforded Santa Clarita the very same opportunity, which Santa Clarita embraced in full. Santa Clarita's "claims" relating to the Consent Decree thus were adjudicated in full.

F. The Use of Consent Decrees to Settle Environmental Disputes is Well Established

Santa Clarita's attempt to find error in the case law is further undermined by the reality that the use of consent decrees is firmly established. *See, e.g., United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) ("Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.")

It is precisely for this reason, i.e., avoidance of prolonged litigation and the possibility of environmental concessions, that in the environmental arena, Courts have upheld the use of consent decrees. *See, e.g., United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 88 (1st Cir. 1990) (environmental cleanup matter; deference to agency required because of its expertise and need for flexibility in forging appropriate resolution); *Sierra Club v. Electronic Controls Design, Inc., supra*, 909 F.2d 1350, 1355 (consent decree challenge involving Clean Water Act citizen suit by Sierra Club against private party); *Citizens for a Better Environment v. Gorsuch, supra*, 718 F.2d 1117, 1125-26 (involving dispute as to consent decree in multi-party litigation under the Clean Water Act).

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

KERRY SHAPIRO
(*Counsel of Record*)
PATRICIA S. BRODY
SCOTT N. CASTRO

JEFFER, MANGELS, BUTLER &
MARMARO, LLP

June 2006